

The Henry Bierce Company and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 348 a/w International Brotherhood of Teamsters, AFL-CIO. Cases 8-CA-21471(E) and 8-CA-21995(E)

May 18, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 30, 1992, Administrative Law Judge John H. West issued the attached supplemental decision. The Applicant filed exceptions and a supporting memorandum, and the General Counsel filed cross-exceptions and a brief in answer to the Applicant's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, memorandum, and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the application of the Applicant, The Henry Bierce Company, Akron, Ohio, for attorney's fees and expenses under the Equal Access to Justice Act is denied.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

JOHN H. WEST, Administrative Law Judge. By order entered June 24, 1992, pursuant to Section 102.148(b) of the Rules and Regulations of the National Labor Relations Board (Board), Respondent's Application for Award of Attorney Fees and Expenses¹ in the above-entitled matter was referred to me for appropriate action.

My February 6, 1991 decision herein, which concluded that Respondent violated the National Labor Relations Act (Act) by conducting an unlawful poll of its employees for the purpose of determining their desire for continued representation by the Union, by failing to provide the Union with reasonable advance notice of the time and place of the poll, by withdrawing recognition from the Union, and by dealing directly with an employee, but did not violate the Act by refus-

¹Included is a motion to withhold financial information on the grounds that disclosure of the information contained in its balance sheet would adversely affect its ongoing operations by making confidential information available to its competitors. The submission was made pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Subsection 504 and Sections 102.143 et seq. of the Board's Rules and Regulations.

ing to execute a purported collective-bargaining agreement,² was adopted by the Board by Decision and Order dated May 20, 1992.

The above-described application, filed June 19, 1992, seeks attorney fees and expenses in the amount of \$21,422³ and \$1,640, respectively.

In its memorandum in support of its application, Respondent points out that the aforementioned regulations provide that:

An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with the significant and discrete substantive portion of that proceeding unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made through an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

Respondent also points out that the Supreme Court in *Pierce v. Underwood*, 487 U.S. 552 (1988), defined "substantially justified" to mean justified to a degree that could satisfy a reasonable person or, in other words, that has a reasonable basis both in law and fact.⁴ It is contended by Respondent that the position taken by General Counsel that the Respondent and the Union reached a meeting of the minds is unreasonable in fact and was not substantially justified; that General Counsel persisted in ignoring the simple facts of this case as confirmed by the testimony of one of his own witnesses, which testimony indicates that there was no meeting of the minds in light of the myriad of altered terms; that the position taken by General Counsel lacks any reasonable basis in law; that Board precedent requires that there be a meeting of the minds before a party will be compelled to execute a written agreement and, therefore, it is impossible for the General Counsel to justify his position, particularly in light of the fact that he concedes that there were several alterations contained in the agreement which was submitted for execution by the Respondent; that the facts and law relied on in determining this case were within the exclusive control of the General Counsel given the absence of formal or informal discovery; that the testimony of one of General Counsel's witnesses, Union Representative Robert DeStefano, alone—completely discounting any evidence submitted by Respondent—supported the dismissal of this particular charge; and that there was no conflicting evidence with regard to the obvious existence of the material alterations, nor was I required to make any credibility determinations in deciding this aspect of the case.

In his motion to dismiss the application, General Counsel argues that in *Pierce v. Underwood*, supra, the Court con-

²This conclusion was based on the fact that a number of material items in the Union's draft contract submitted to the Respondent for signature were different than what was discussed and understood during the involved negotiations and, therefore, there was no meeting of the minds between the parties.

³This represents 263.75 attorney hours \$75 an hour.

⁴That case dealt with fee awards in civil actions where the United States is a party vis-a-vis adversary administrative adjudications. Nonetheless, this definition has been applied to Board proceedings.

cluded that “a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact”; that Congress emphasized that no adverse inferences were to be drawn from the fact that the Government did not prevail in the adversary adjudication; that EAJA provides that the Government should not be held liable where “special circumstances make an award unjust”;⁵ that EAJA entitles a private party who prevails against a federal agency in whole or in a significant and discrete substantive portion of the proceeding to recover its fees and expenses, unless the General Counsel was substantially justified; that Webster’s New Collegiate Dictionary defines discrete as “1. constituting a separate entity: individually distinct; 2 a: consisting of distinct or unconnected elements”; that even if one were to find that the General Counsel was not substantially justified in alleging that Respondent violated the Act by failing to execute an agreed-upon contract, which the General Counsel does not concede, an award would not be justified because the evidence presented at the hearing was so intertwined and coextensive with that involving the unlawful conduct found to have been engaged in by the Respondent, that an award for legal expenses would not be justified; that since the Respondent argued that an allegation of direct dealing cannot lie where an employer legally refused to execute a purported agreement and lawfully polls its work force and withdraws recognition, General Counsel was required to show that the Union was and continued to be the representative of Respondent’s employees; that Respondent in its position statement to the Board, Appendix B to my decision, maintained that it was not required to sign the contract because it lawfully polled its employees; that in both its answers to the original complaint and the amended complaint, Respondent set forth the affirmative defense that the Union, in fact, did not represent a majority of its employees in an appropriate unit; that in view of the fact that the evidence relating to Respondent’s failure to sign the contract also relates directly to or were the reasons why Respondent engaged in conduct found to be unlawful, these matters would have been litigated and the evidence presented regardless of whether or not the complaint also alleged a failure to execute the contract; that during the investigation of the involved charge Respondent took the position, as demonstrated by its position statement to the Board, that it refused to execute the contract because it had a good-faith doubt as to the Union’s majority status and there was no meeting of the minds with respect to the issues of wages; that during the investigation Respondent never raised any issue with regard to any other clauses in the contract and such issue was not raised until the union witness had testified at the hearing herein; that when reviewing DeStefano’s affidavit to the Board, a copy of which is attached to General Counsel’s motion, which affidavit indicates that the parties had reached agreement, coupled with Respondent’s position statement, the only issue to be resolved at the hearing was a credibility issue, namely, did the parties reach agreement on the wage issue; that the issue as to the clauses was never advanced to the Union as a reason

⁵ It is pointed out that special circumstances includes a situation where the Government advances in good faith a close question of law and fact.

for the Respondent’s failure to sign the contract nor did Respondent’s counsel indicate to the Regional Office during the investigation that these were concerns of the Respondent nor were they raised as an affirmative defense by the Respondent in its answer to the complaint; and that even assuming that some fees are recoverable, certain of the fees and expenses sought are not recoverable.

And in its reply to General Counsel’s motion to dismiss, Respondent argues that Respondent prevailed on a significant and discrete substantive portion of the hearing in that while it was arguably necessary for General Counsel to litigate the withdrawal of recognition issues in tandem with the direct dealing claim, the refusal to execute allegation was completely independent; that counsel for the Respondent was a bit reluctant to provide General Counsel with prehearing, unilateral discovery via a position statement detailing each and every conceivable defense surely does not serve to strip the Company of its EAJA rights; that General Counsel also has a duty to thoroughly investigate the dispositive law arguably supportive of the dismissed 8(a)(5) charge; and that General Counsel’s suggestion that the decision rested on credibility resolutions is bogus.

With respect to the last above-described assertion of Respondent in its reply to General Counsel’s motion to dismiss, General Counsel does not suggest that the decision rested on credibility resolutions. Rather, General Counsel argues that when reviewing DeStefano’s affidavit, which asserts that the parties had reached agreement, with Respondent’s position statement, the only issue to be resolved at the hearing was the credibility issue of whether the parties had reached agreement on the wage issue. In other words, General Counsel argues that the Union contended that there was a contract except for the fact that it was not signed by Respondent. Respondent voluntarily submitted a position an 11-page position statement. In it, Respondent did not argue that there was never a “meeting of the minds” because the contract tendered by the Union for Respondent’s signature contained material clauses which were different from what was discussed and understood during negotiations. Respondent now appears to take the position that General Counsel should not have relied on the position statement that Respondent submitted to the Board; that General Counsel had an obligation to discount the positions taken by Respondent in its position statement, investigate further and consider other possible defenses. Respondent seems to be asserting that that which was not obvious enough to it to be included in its position statement should, nonetheless have been obvious to the General Counsel.⁶ Respondent does not deny General Counsel’s assertion that Respondent did not assert that there was no meeting of the minds because of these material alterations as an affirmative defense in its answers to the complaint or the amended complaint. While General Counsel has a duty to investigate, in my opinion, under the circumstances existing here it acted reasonably. On the one hand, General Counsel had the Union asserting that there was a contract. On the other hand, General Counsel had the Respondent, in its posi-

⁶ One who is seeking to avoid going to hearing would not normally exclude a determinative argument from a position statement for tactical reasons, and if one engaged in such conduct, should his later assertion that he should not have been forced to go to hearing be heeded when all the while he himself held the means for avoiding it?

tion statement, asserting a number of arguments, none of which touched on the fact that there was no meeting of the minds because of the material alterations. It was reasonable for the General Counsel to conclude going into the hearing that it had come down to who was telling the truth about the question of wages. Although this was not the basis of my conclusions on this aspect of the case, in my opinion, General Counsel was substantially justified in filing the complaint, proceeding to hearing and testing my conclusions on this aspect of the involved case.⁷

⁷In view of this determination, there is no need to treat other arguments made by General Counsel in his motion.

ORDER⁸

IT IS ORDERED that the application be, and it is hereby, dismissed.

⁸If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.